STATE OF MICHIGAN

IN THE SUPREME COURT

BARBARA SUE TRAXLER and NORMA JEAN CASTLE, Successor Co-Trustees of THE NORMAN JOHN SINCLAIR TRUST, DATED MARCH 27, 1996,

Plaintiffs/Counter-Defendants/Appellees,

v

SHIRE ROTHBART,

Defendant/Counter-Plaintiff/Appellant.
_____/

Supreme Court No. 125948

Court of Appeals No. 243492

Lower Ct No. 01-032868-CH

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BRIEF OF *AMICUS CURIAE* THE COUNCIL OF THE STATE BAR OF MICHIGAN'S PROBATE AND ESTATE PLANNING SECTION

TABLE OF CONTENTS

Page

The
COUNCIL OF THE STATE BAR OF MICHIGAN'S
PROBATE AND ESTATE PLANNING SECTION
respectfully submits the following position on:

*

Barbara Sue Traxler v Shire Rothbart

*

The Probate and Estate Planning Section is not the State Bar of Michigan itself, but rather a Section which members of the State Bar choose voluntarily to join, based on common professional interest.

The position expressed is that of the Council of the Probate and Estate Planning Section only and is not the position of the State Bar of Michigan. To date, the State Bar of Michigan does not have a position on this matter.

The total membership for the Probate and Estate Planning Section is 5063.

The position was adopted by a unanimous vote of the Council of the Probate and Estate Planning Section after discussion at Council meetings on January 8, 2005, and again on February 19, 2005, held in conformance with the Section's bylaws. The number of members in the decision-making body is 23.

Report on Public Policy Position

Name of Section:
Probate and Estate Planning Section

Contact Person:
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Other:
amicus curiae brief in the Matter of Barbara Sue Traxler v Shire Rothbart

Date position was adopted:
February 19, 2005

Process used to take the ideological position:
Discussion at Council meetings on January 8, 2005, and again on February 19, 2005

Number of members in the decision-making body:
23

Number who voted in favor and opposed to the position:
19 in favor
0 opposed

4 members absent

FOR SECTIONS ONLY:

- ✓ This subject matter of this position is within the jurisdiction of the section.
- ✓ The position was adopted in accordance with the Section's bylaws.
- ✓ The requirements of SBM Bylaw Article VIII have been satisfied.

If the boxes above are checked, SBM will notify the Section when this notice is received, at which time the Section may advocate the position.

Position:
The Council respectfully requests that the Court hold as follows:

(1) a standard trust provision providing that the fiduciary power or discretion vested in an initial trustee "shall be vested in and exercisable by any successor trustee" must be read as vesting the fiduciary power or discretion in the successor trustee or trustees, and does not entitle one of two successor trustees to bind the trust unilaterally;

(2) the phrase "third person dealing with a trustee" in MCL 700.7404 refers to those not a party to the trust, i.e., someone other than the settlor, trustee, or beneficiary, such as a buyer of property from the trust;

(3) MCL 700.7404 is inapplicable here because the provision does not deal with a purchaser's duty to ascertain who the trustees are and whether the purchaser is dealing with all the trustees; and

(4) a person or institution nominated as trustee is not actually a trustee until the nominee either signs an acceptance of trust or takes some action consistent with holding the office of trustee.

The text (may be provided by hyperlink) of any legislation, court rule, or administrative regulation that is the subject of or referenced in this report:

ESTATES AND PROTECTED INDIVIDUALS CODE (EXCERPT)
Act 386 of 1998

700.7404 Persons dealing with trustee.
Sec. 7404.
With respect to a third person dealing with a trustee or assisting a trustee in the conduct of a transaction, the existence of a trust power and its proper exercise by the trustee may be assumed without inquiry. The third person is not bound to inquire whether the trustee may act or is properly exercising the power. A third person, without actual knowledge that the trustee is exceeding a trust power or improperly exercising it, is fully protected in dealing with the trustee as if the trustee possessed and properly exercised the power the trustee purports to exercise. A third person is not bound to assure the proper application of trust property paid or delivered to the trustee.

History: 1998, Act 386, Eff. Apr. 1, 2000

INDEX OF AUTHORITIES

Page

State Cases

Statutes

Page

Other Authorities

BASIS OF JURISDICTION

This Court has jurisdiction over this matter pursuant to MCR 7.301(a)(2) and the Court's Order of December 27, 2004, granting Defendant/Counter-Plaintiff/Appellant Rothbart's Application for Leave to Appeal. (123a.) Rothbart appeals from an Opinion of the Michigan Court of Appeals dated March 2, 2004. (10a.)

STATEMENT OF RELIEF SOUGHT

The State Bar of Michigan's Probate and Estate Planning Council (the "Council") files this *amicus* brief pursuant to the Court's invitation in the December 27, 2004 Order granting the Application for Leave to Appeal. (123a.) The Council respectfully requests that the Court hold as follows:

(1) a standard trust provision providing that the fiduciary power or discretion vested in an initial trustee "shall be vested in and exercisable by any successor trustee" must be read as vesting the fiduciary power or discretion in the successor trustee *or trustees*, and does not entitle one of two successor trustees to bind the trust unilaterally;

(2) the phrase "third person dealing with a trustee" in MCL 700.7404 refers to those not a party to the trust, i.e., someone other than the settlor, trustee, or beneficiary, such as a buyer of property from the trust;

(3) MCL 700.7404 is inapplicable here because the provision does not deal with a purchaser's duty to ascertain who the trustees are and whether the purchaser is dealing with all the trustees; and

(4) a person or institution nominated as trustee is not actually a trustee until the nominee either signs an acceptance of trust or takes some action consistent with holding the office of trustee.

QUESTIONS PRESENTED FOR REVIEW

1. Is a co-trustee empowered to act unilaterally by a clause in a trust document that states the fiduciary power or discretion vested in an initial trustee "shall be vested in and exercisable by any successor trustee"?

The Trial Court answered: no.

The Court of Appeals answered: no.

The Probate and Estate Planning Council answers: no.

2. May a third party enforce a purchase agreement where, without the third party's knowledge, the trustee exceeded the trustee's authority by entering into the agreement?

The Trial Court did not answer this question.

The Court of Appeals answered: no.

The Probate and Estate Planning Council answers: yes, provided the third party first ascertains that he is dealing with all of the co-trustees.

3. Must a nominated trustee either sign an acceptance of trust or take some other action consistent with holding the office of trustee to accept the nomination?

The Trial Court did not answer this question.

The Court of Appeals did not answer this question.

The Probate and Estate Planning Council answers: yes.

STATEMENT OF FACTS AND PROCEEDINGS

The facts most pertinent to the legal issues presented in this *amicus curiae* brief are summarized as follows:

The Parties, the Trust, and the Transaction

Norman John Sinclair, deceased, established a Living Revocable Trust (the "Trust") on March 27, 1996. (Compl ¶ 1, 63a.) The Trust is governed by a trust instrument (the "Trust Agreement," 14a-52a) and owns certain real property in West Bloomfield, Michigan, which is the subject of this suit (the "Property"). (Compl ¶ 4, 63a.)

The Trust Agreement established Mr. Sinclair as the initial trustee (Trust Agreement § 7.1, 37a), and nominated Mr. Sinclair's daughters, Norma Jean Castle and Barbara Sue Traxler, as potential successor co-trustees, one or both of whom would serve in the event of Mr. Sinclair's death or incapacity, if they chose to accept such responsibilities (*id.* § 7.3(A), 37a). The Trust Agreement further provided that: "Any fiduciary power or discretion vested in the Initial Trustee shall be vested in and exercisable by any successor trustee." (*Id.* § 8.3, 44a.) Mr. Sinclair died on December 30, 2000. (Compl ¶ 2, 63a.)

On March 21, 2001, Appellant Shire Rothbart submitted a written offer to Traxler to purchase the Property for $430,000 (the "Offer," 58a-60a). On March 30, 2001, Traxler purported to accept the Offer, in writing, on behalf of the Norman John Sinclair Trust and in her capacity as "Successor Trustee of the Norman John Sinclair Trust." (60a.) At the time she signed the Offer, Traxler believed she was authorized to sell the Property by virtue of a "guardian paper." (Traxler Dep at 27, 87a.) Indeed, when Rothbart asked Traxler whether she had authority to consummate the transaction, she said yes and told him she "had the guardianship paper." (*Id.* at 28, 87a.) But Traxler's "acceptance of a guardianship was not enough to

convince" Rothbart that Traxler had the authority to sell the property (Rothbart Dep at 51, attached as Ex H to Resp to Application for Leave to Appeal), and Rothbart told Traxler: "if your sister doesn't go along with this, just let me know. . . .[,] we'll call the deal off." (*Id.*)

Traxler told Castle about the property sale the same day, and Castle "was very upset." (Traxler Dep at 29, 88a.) So, sometime later, Traxler informed Rothbart that the "Purchase Agreement was null and void due to the fact that Successor Co-Trustee, Norma Jean Castle, did not authorize, assent to or sign the agreement to purchase the property." (Compl ¶ 12, 64a.) Traxler and Castle then filed their Complaint, seeking a declaration that the Agreement was unenforceable (62a-69a), and Rothbart counterclaimed, seeking specific performance (70a-80a).

The Trial Court Opinion

The Oakland County Circuit Court issued its Opinion and Order on June 13, 2002, holding that Rothbart was "not entitled to specific performance of the purchase Agreement," and that Traxler and Castle were "entitled to a declaration that the Agreement is null and void." (Circuit Ct Op at 8, 8a.) The court first rejected Rothbart's argument that Section 8.3 of the Trust Agreement literally gave "any successor trustee" the power to bind the Trust:

> Although the language in section 8.3 of the Trust contains the word "any", this section of the Trust simply states a successor trustee has the same powers as the initial trustee. Furthermore, there is no other language in the Trust granting one trustee the authority to act where there are co-trustees.

(*Id.*)

The court then rejected Rothbart's reliance on MCL 700.7404, because the parties' "Agreement requires marketable title be transferred to the purchaser or that the earnest

money deposited be refunded. The Plaintiffs in this case have presented evidence that title will not be insurable and the Defendant has presented no evidence to the contrary." (Circuit Ct Op at 8-9, 8a-9a.)

Finally, the court noted that "Norma Jean Castle has submitted an affidavit indicating that at no time was she unwilling to act as Co-Trustee and the Defendant has failed to provide evidence or an affidavit stating otherwise." (Circuit Ct Op at 9, 9a.) Thus, Castle could not be deemed to have relinquished her authority as co-trustee. Rothbart appealed.

The Court of Appeals Opinion

The Michigan Court of Appeals affirmed in its opinion of March 2, 2004. The panel first agreed with the trial court's interpretation of Section 8.3:

> Section 8.3 of the trust simply gave any successor trustee all the rights and powers of the first named trustee, which in this case was the grantor himself. The section mirrors the statutory provision to the same effect, MCL 700.7405. The use of the singular term "trustee" in section 8.3 of the trust and others is a stylistic convenience and cannot be read as indicative of the grantor's intent that a co-trustee could act unilaterally.

(Court of Appeals Op at 2, 11a.)

The panel next rejected Rothbart's "contention that Castle relinquished her authority by silence and/or inaction, leaving Traxler to serve as sole trustee." (Court of Appeals Op at 2, 11a.):

> No evidence was ever produced of Castle's written resignation as co-trustee, as required by the trust or in accordance with MCL 55.25, to release Castle from her responsibility. . . . Because defendant presents no evidence to create a factual dispute regarding whether Traxler was authorized to act as sole trustee or whether Castle had affirmatively relinquished her authority, we find that the trial court properly concluded that the trust did not authorize Traxler to act unilaterally to bind the trust to the purchase agreement contract.

(*Id.* at 2-3, 11a-12a.)

The panel then turned to Rothbart's argument that MCL 700.7404 permitted him to rely on Traxler's misrepresentation or misunderstanding of her actual authority. The panel rejected this position for two reasons:

> [To begin, t]he language of MCL 700.7404 indicates a third person is only protected if 'the trustee is exceeding a trust power or improperly exercising it.' Traxler did not merely exceed her authority as co-trustee, Traxler purported to exercise authority she did not have.
>
> Even if Traxler's actions could be construed as an 'improper exercise' of her authority, the protection of MCL 700.7404 only applies to third persons. . . . Defendant's status arises from a contractual dispute where defendant is a primary party to that contract. As such, defendant does not qualify as a third person and cannot avail himself of the statute's protection.

(Court of Appeals Op at 4, 13a.) In light of these various holdings, the panel concluded it was unnecessary to address the trial court's conclusion regarding marketable title. (*Id.*)

This Court issued its Order granting Rothbart's Application for Leave to Appeal on December 27, 2004. (123a.) The Order directs that among the issues to be briefed, the parties shall address "whether a third party may enforce a purchase agreement where, without the third party's knowledge, the trustee exceeded the trustee's authority by entering into the agreement." The Order also invites the Probate and Estates Section of the State Bar of Michigan to file a brief *amicus curiae* on the issue. (*Id.*)

STANDARD OF REVIEW

This Court reviews a grant of summary disposition *de novo*. *Smith v Globe Life Ins Co*, 460 Mich 446, 454; 597 NW2d 28 (1999). In addition, this Court's review of statutory interpretation is *de novo*. *Graves v American Acceptance Mort Corp*, 467 Mich 308; 652 NW2d 221, 222-223 (2002) (citing *Smith*).

ARGUMENT

I. THE TRUST AGREEMENT DID NOT AUTHORIZE A SINGLE CO-TRUSTEE TO CONVEY THE TRUST'S REAL PROPERTY.

Section 8.3 of the Trust Agreement states that "[a]ny fiduciary power or discretion vested in the Initial Trustee shall be vested in and exercisable by any successor trustee." (Trust Agreement § 8.3, 44a (emphasis added).) Rothbart argues that Section 8.3 literally authorizes "any . . . trustee" to act on behalf of the Trust. But the intent of this provision is simply to grant to any successor trustee or trustees all the rights and powers of the initial trustee. The Court of Appeals characterized the provision as a "stylistic convenience [that] cannot be read as indicative of the grantor's intent that a co-trustee could act unilaterally." (Court of Appeals Op at 2, 11a.) The Court of Appeals' characterization is correct and consistent with the plain language of the Trust Agreement.

The Trust Agreement's power granting provisions are contained in Section 8.1, which states:

> The rights, powers and duties of the Trustee with respect to the investment and management of the trust estate of any trust created herein shall include: . . . B. To sell, exchange, assign, transfer, and convey any . . . property, real or personal, held in the trust estate, at public or private sale, at such time and price and upon such terms and conditions (including credit) as the Trustee may determine . . . .

(Trust Agreement § 8.1(B), 40a (emphasis added).) The meaning of the word "Trustee" is then clarified in Section 10.6:

> **E. Trustee**
> . . . The term "Trustee" as used herein refers to all persons or corporations occupying the position, whether one or more persons together with a corporation occupy the position of Trustee at the same time or times, and includes any successor trustee *or trustees*.

(Section 10.6(E), 51a (emphasis added).).

The Trust Agreement's drafter could have chosen to repeat the phrase "trustee or trustees" throughout the document; however, by defining the singular term "trustee" to include the singular or the plural, the drafter avoided the need to repeat this cumbersome phrase. The plain language of Section 10.6(E) dictates that Section 8.3 be read as vesting the fiduciary power or discretion of the initial trustee in the successor trustee *or trustees*. Nowhere does the language of the Trust Agreement suggest that a single co-trustee can act without the approval of his or her co-trustee. *Accord Nichols v Pospiech*, 289 Mich 324, 334; 286 NW2d 633 (1939) (one co-trustee could not bind the trust estate in a real estate transaction unless the other co-trustee joined in the execution of the purchase agreement).

The Court of Appeals' interpretation is consistent with MCL 700.7406(4), which states that when a trust agreement names two co-trustees, all acts and duties performed on behalf of the trust must be performed by both trustees, unless otherwise provided in the trust. Since the Trust Agreement here does not provide otherwise, this Court should affirm the Court of Appeals' holding that Section 8.3 does not authorize a single co-trustee to act unilaterally.

II. MR. ROTHBART FAILED TO ASCERTAIN THAT HE WAS DEALING WITH ALL OF THE TRUSTEES. ACCORDINGLY, MCL 700.7404 IS INAPPLICABLE.

The Court of Appeals held that MCL 700.7404 is inapplicable here because the statute only applies to a "third person dealing with a trustee," and Rothbart was not a third party to the transaction, but "a primary party to [the] contract." (13a.) In so holding, the Court of Appeals reached the right result, but for the wrong reason. It is the Council's position that Rothbart is a "third party" for purposes of MCL 700.7404; however the Court of Appeals erred by applying the provision in this case. The Court of Appeals applied Section 7404 to the question of a third party's duty to ascertain who the trustees are. But Section 7404 does not

answer this question at all. It addresses whether a third party must ascertain the powers of the persons who hold the office of trustee.

A. To Fall Within the Scope of MCL 700.7404, A Party Dealing With a Trust Must First Ascertain the Identity of All Acting Trustees.

MCL 700.7404 states, in full:

> With respect to a third person dealing with a trustee or assisting a trustee in the conduct of a transaction, the existence of a trust power and its proper exercise by the trustee may be assumed without inquiry. The third person is not bound to inquire whether the trustee may act or is properly exercising the power. A third person, without actual knowledge that the trustee is exceeding a trust power of improperly exercising it, is fully protected in dealing with the trustee as if the trustee possessed and properly exercise the power the trustee purports to exercise. A third person is not bound to assure the proper application of trust property paid or delivered to the trustee.

(emphasis added). As the plain language of the provision indicates, a third party need not inquire whether a power is being properly exercised or exceeded, provided the third party is dealing with "the trustee." In other words, to fall within the scope of the statute's protection, third parties must first ascertain whether they are dealing with the trustees and whether they are dealing with all of the trustees.

Verifying the identity of the trustees is easily done, either by examining a Certificate of Trust Existence and Authority, *see* MCL 565.435, or by reviewing the trust document and any documents appointing or removing trustees and any documents constituting acceptances or declinations of trusteeship. The inquiry is similar to that undertaken by potential purchasers of real property who, to fall within the protection of the bona fide purchaser statute, must first examine the chain of title to ascertain whether they are dealing with the property owner and whether they are dealing with all who have an interest in the property. *See* MCL 565.435 ("A purchaser or other party relying upon the information contained in a recorded

certificate of trust existence and authority shall be afforded the same protection as is provided to a subsequent purchaser in good faith under [MCL 565.29] . . . .").[1] It is only after a third party verifies that he is dealing with all acting trustees, that he may make assumptions about the powers the trustees are entitled to exercise.

Here, Rothbart understood the nature of his obligation to verify the identity of the trustees, because he asked Traxler, point blank, "do you have something that—either from the court or your father that appoints you a trustee, and she pulled out a piece of paper, and what it was, as I believe, was her acceptance of a guardianship of her father." (Rothbart Dep at 37, attached as Ex H to Resp to Application for Leave to Appeal.) Even though Rothbart understood that this was insufficient to demonstrate Traxler's trusteeship (*see id.* ("the paper was her acceptance of a guardianship, which I indicated was not an acceptance of a trusteeship"), he apparently failed to take the next step and ask for the Certificate of Trust Existence and Authority or to examine the Trust Agreement.[2] Had he done so, he could have easily determined that Traxler and Castle were nominated as co-Trustees, and then further inquired whether Castle

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[1] It is for precisely this reason that Michigan Land Title Standard 8.3 will not confer "marketable" status on a deed executed by a trustee unless either the Certificate of Trust Existence and Authority or the trust instrument itself is of public record.

[2] Ms. Traxler testified at her deposition as follows:

Q: Did you provide [Rothbart] with a copy of the Trust Agreement that's Exhibit 1?

A: I don't believe so.

Q: Did you provide him with anything that identified who were the trustees of the trust?

A: I believe that's the only paper I gave him.

Q: You're pointing to Exhibit 2, the guardianship?

A: The guardianship.

Q: Okay. You showed him that, but you didn't show him the trust papers?

A: I don't believe I did.

(Traxler Dep at 28, 87a.)

ever expressly declined or accepted her duties as trustee, such that her assent was also necessary to consummate a transaction for Trust property.

The Council notes that this Court framed the issue presented as "whether a third party may enforce a purchase agreement where, without the third party's knowledge, the trustee exceeded the trustee's authority by entering into the agreement." (123a.) The Council submits that this question should be answered "yes," but subject to a threshold verification that "the trustee" is the only valid trustee acting on behalf of the trust. The issue presented by the facts here should be "whether a third party may enforce a purchase agreement where the party fails to ascertain the identity of all acting trustees, and one of two co-trustees purports to enter into the agreement." And the answer to this reframed question is "no."

If the rule were otherwise, and a third party dealing with a trust was relieved of any duty of inquiry regarding the identity of the trustees, intractable problems would result. For example, what would a court do if two co-trustees executed, on the same day and at the same time, two different purchase agreements for the same trust property? Forcing a potential real property purchaser to first ascertain the identity of all trustees before being allowed to invoke MCL 700.7404 resolves that problem and is consistent with the plain language of the statute. Because Rothbart failed to ascertain whether he was dealing with all co-trustees here, he may not rely on the statute's protection.

B. This Court Should Clarify That MCL 700.7404 Applies to Parties That Enter Into Transactions with a Trust.

The Council believes the Court of Appeals has misinterpreted MCL 700.7404. Therefore, and notwithstanding MCL 700.7404's inapplicability to this dispute due to Rothbart's failure to ascertain the identity of all trustees, this Court should use this opportunity to clarify that the statute's reference to "third person" means anyone a stranger to the trust relationship

(*i.e.*, anyone other than the settlor, trustee and beneficiaries) and that the Court of Appeals erred in holding that Rothbart was not a "third person" as that phrase is used in the statute.

The statute applies "to a third person dealing with a trustee or assisting a trustee in the conduct of a transaction." MCL 700.7404 (emphasis added). In other words, the statute protects two classes of individuals, (1) those who are parties to the transaction ("dealing with a trustee") and (2) those who are not parties to the transaction, but who assist in effectuating it ("assisting a trustee in the conduct of a transaction"), such as a broker or title company.

Rather than interpreting this phrase as a whole, the panel looked to Black's Law Dictionary's definition of "third party" and concluded that Rothbart was not a "third person" because he was "a primary party to [the] contract." (13a.) But such an interpretation impermissibly writes the phrase "dealing with a trustee" out of the statute entirely. *See Lamp v Reynolds*, 249 Mich App 591, 597; 645 NW2d 311 (2003) (any construction that would render part of a statute surplusage or nugatory must be avoided). To give all the statutory words meaning, the phrase "third person" must be interpreted as referring to those not a party to the trust, i.e., someone other than the settlor, trustee, or beneficiary, such as a buyer of property from the trust.

Numerous authorities implicitly recognize this point. For example, MCL 700.7404 is substantially the same as Section 7 of the Uniform Trustees' Powers Act ("UTPA"). And courts interpreting provisions in other states that have adopted Section 7 have reached the same conclusion as the Council. *See, e.g., Adler v Manor Healthcare Corp*, 9 Cal Rptr 2d 732, 734 (Cal Dist Ct App, 1992) ("In recommending replacement of former Civil Code section 2243 with section 18100 [California's UTPA § 7, the Law Revision Commission expressly intended to give greater protection to the rights of a third-party purchaser of trust property.") (emphasis

added).[3] Indeed, the comments to Section 1012 of the Uniform Trust Code, which is also "derived from Section 7 of the UTPA," specifically recognize that this provision protects "persons other than beneficiaries who assist a trustee with a transaction, and persons other than beneficiaries who deal with the trust for value. As long as the assistance was provided or the transaction was entered into in good faith and without knowledge, third persons in either category are protected in the transaction even if the trustee was exceeding or improperly exercising the power." Uniform Trust Code § 1012, cmt (emphasis added). Accordingly, this Court should clarify that the phrase "third person" refers to those who are not parties to the Trust, and includes those like Rothbart who attempt to purchase real property from a trust.

III. THE RECORD IS INSUFFICIENT TO DETERMINE WHETHER CASTLE EVER ACCEPTED HER CO-TRUSTEESHIP.

The last question this Court should address is whether Ms. Castle's silence and inaction over a three-month period constituted a declination of her co-trusteeship. Under well-settled principles of trust law, a nominated trustee must either sign an acceptance of trust or take some action consistent with holding the office of trustee to accept the nomination. Restatement Third, Trusts § 35(1) (2001) ("A designated trustee may accept the trusteeship either by words or by conduct."); II A. Scott and W. Fratcher, The Law of Trusts § 102.2, p 82 (4th ed. 1987) ("[I]t seems absurd to say that the trustee has accepted the trust, and undertaken to perform the duties imposed by the terms of the trust, unless he has in fact indicated by his words or conduct an intention to accept the trust.").

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[3] *Accord St Martin's Episcopal Church v Prudential-Bache Sec, Inc*, 613 So 2d 108, (Fla Dist Ct App, 1993) (noting that Florida's UTPA § 7 "has as its purpose the protection of third parties to whom trust property is conveyed, where the third party has no knowledge of any defect in their grantor's authority or use of trust powers") (emphasis added); *Gleason v Elbthal Realty Trust*, 445 A2d 1104, 1106 (NH, 1982) (recognizing, in *dictum*, that plaintiff purchasing property from two trustees fell within the scope of New Hampshire's UTPA § 7).

Here, from Sinclair's death in December 2000 through Traxler's execution of the agreement with Rothbart on March 30, 2001, Castle apparently did not sign an acceptance or start acting like a trustee, as Traxler testified at her deposition:

> Q: Prior to signing the [real estate] agreement, had you had discussions with your sister about who could enter into agreements on behalf of the trust?
>
> A: No.
>
> Q: Did your sister ever sign any document or order of the court appointing her guardian or trustee?
>
> A: No.
>
> Q: Did she ever sign anything where she accepted her responsibility as co-trustee under the trust?
>
> A: I don't believe so. I don't know.
>
> Q: Has she—has she ever acted in any way as a co-trustee under the trust?
>
> A: I don't believe so. I don't know what she does.

(Traxler Dep at 30, 88a.) Thus, there is a question whether Ms. Castle ever became a trustee.

The Court of Appeals asked whether Ms. Castle ever relinquished her authority as trustee, and it answered that question no. But that was the wrong question. The Court of Appeals should have first asked whether Michigan should follow Section 35(1) of the Third Restatement,[4] and, if so, whether Ms. Castle's failure to affirmatively accept the trusteeship constituted a declination.

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[4] This Court and the Michigan Court of Appeals have frequently turned to the Restatement of Trusts in a variety of other contexts. *See, e.g., In re Hertsberg Inter Vivos Trust*, 457 Mich 430, 434; 578 NW2d 289 (1998) (adopting Section 156 of the Second Restatement); *In re Frances Williams Messer Trust*, 2005 WL 665120, at *4 (Mich Ct App, Mar 22, 2005) (invoking section 227(b) of the Third Restatement); *Prentis Family Found v Barbara Ann Karmanos Cancer Institute*, 2005 WL 326876, at *7 (Mich Ct App, Feb 10, 2005) (relying on section 391 of the Second Restatement).

With respect to whether Michigan should follow the Restatement, this Court should answer "yes" and hold that succession to the trusteeship may be satisfied only by (1) written affirmance of same, or (2) evidence of actions consistent with those of a trustee. It is not uncommon that a financial or other institution will be named as a successor trustee but will not be informed about the designation. It makes no sense to impose liability on an institution or individual for breach of trust until after the trusteeship has been accepted; in the same vein, it is improper to assume an institution or individual is a co-trustee until after the trusteeship has been accepted. Indeed, a "person who has not accepted the office cannot be compelled to act as trustee." Restatement Third, Trusts § 35, cmt a (2001). Here, it was not enough for Ms. Castle to submit an affidavit indicating that at no time was she unwilling to act as Co-Trustee. The law requires her to affirmatively do something to accept her position as Co-Trustee.[5]

The Council believes that in some circumstances, a sufficient lapse of time can constitute a declination. (An extreme example of this principle is *In re Clout and Frewer's Contract*, [1924] 2 Ch 230, where a co-trustee's failure to act in any way for 30 years constituted a disclaimer of the trusteeship.) Here, however, the facts point to no clear outcome as a matter of law. Whether Ms. Castle's silence and inaction over three months can be construed as a declination should be presented in the first instance to the trier of fact. Among other evidence the fact finder might find helpful is Traxler's testimony that the trust sold another parcel to satisfy estate taxes, and that both she and Castle signed the purchase and sale agreement for that transaction. (Traxler Dep at 12-13, 83a-84a.) (Ultimately, Traxler was unable to recall at her deposition exactly when that transaction took place. *Id.* at 12, 83a.) Although the Council does

[5] This legal conclusion is consistent with the Trust Agreement, which requires that a nominated co-trustee be "able and willing to act" before becoming a successor co-trustee. (Trust Agreement § 7.3(A), 37a.) The Agreement further specifies that if "only one named successor is able and willing to act, that successor Trustee may serve as sole successor Trustee." (*Id.*)

not take a position on how long inaction must exist before it ripens into a declination of trust, this matter should be remanded to the trial court for further proceedings regarding Castle's potential declination.

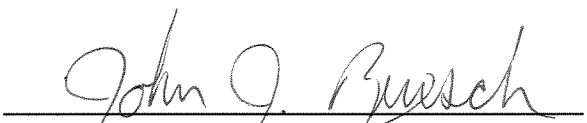
CONCLUSION

The Council respectfully requests that this Court reverse in part and remand this case to the trial court. Specifically, the Council requests that this Court: (1) affirm that the Trust Agreement contemplated that decisions be made by the co-trustees acting together, not unilaterally; (2) hold that the term "third person" appearing in MCL 700.7404 refers to anyone a stranger to the trust relationship (i.e., anyone other than the settlor, trustee, and beneficiaries); (3) hold that MCL 700.7404 does not exonerate third parties from ascertaining the identify of all then serving trustees and therefore is inapplicable in these circumstances because Rothbart failed to ascertain the identity of all co-trustees; and (4) remand the case to the trial court for fact findings to determine whether Castle's inaction ripened into a declination of trust.

Respectfully submitted,

Date: March 28, 2004

WARNER NORCROSS & JUDD LLP

By 

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